

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

BETTINA POIRIER, MAJORITY STAFF DIRECTOR
ZAK BAIG, REPUBLICAN STAFF DIRECTOR

June 24, 2013

Honorable Sylvia Mathews Burwell
Director
The Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Dear Director Burwell,

It is my understanding that the Office of Management and Budget (OMB) is currently reviewing a rule proposed by the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) related to the economic impact of designating critical habitat for endangered and threatened wildlife. The rule proposed by those agencies in August 24, 2012 limits the type of economic analysis that is required for critical habitat designations. It will not provide the public with an adequate understanding of the full costs of a critical habitat designation, including those costs associated with the listing, and I urge you to reject that approach.

On February 1, 2013, twenty-three senators contacted the FWS and the National Oceanic and Atmospheric Administration to make clear that the proposal should be changed to require a full accounting of the cost of an endangered species. Because of sue and settle agreements with radical environmental groups, listing determinations will be made on hundreds of species and millions of acres will be designated as critical habitat. At a minimum, the agencies making those determinations should be transparent about the costs of such listings and designations. The approach that is advocated in the August proposal falls short of the goal of transparency.

The August proposal by the agencies adopts an incremental approach to economic impact analyses of critical habitat designations. Such an approach requires a less thorough economic analysis by excluding the costs associated with the listing of a species. By ignoring the costs associated with a species' listing, the incremental approach fails to ensure that the economic hardships felt by private property owners and state governments are greatly discounted.

Rather than using an incremental approach, twenty-three member of the Senate requested the agencies use a more thorough method, known as the coextensive approach. I have attached a copy of that letter so that you can understand why it is so important for the final rule to use a coextensive approach. Doing so will ensure that both regulators and the public are aware of the true costs associated with designated critical habitat for an endangered species.

As the Ranking Member of the Committee that has oversight jurisdiction of the Endangered Species Act, I want to ensure that listing determinations and the costs associated with those determinations are made in as transparent a manner as possible. The approach advocated by the

agencies in the August proposal is not transparent and avoids shedding light on the true costs of a species listing. I urge you to reject the incremental approach and ensure that the final rule requires comprehensive economic analysis.

Sincerely,

A handwritten signature in blue ink that reads "David Vitter". The signature is fluid and cursive, with the first name "David" and last name "Vitter" clearly distinguishable.

David Vitter
Ranking Member
Senate Committee on Environment and Public Works

cc: Sally Jewell, Secretary, U.S. Department of the Interior
Dan Ashe, Director, U.S. Fish and Wildlife Service
Dr. Kathryn Sullivan, Acting NOAA Administrator

United States Senate
WASHINGTON, DC 20510

February 1, 2013

Dan Ashe, Director
US Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240

Dr. Jane Lubchenco, Administrator
National Oceanic and Atmospheric Administration
1401 Constitution Avenue, NW
Room 5128
Washington, DC 20230

RE: Revisions to Regulations for Impact Analyses of Critical Habitat Docket Nos. FWS-R9-ES-2011-0073 & NOAA-120606146-2146-01

Dear Director Ashe and Administrator Lubchenco,

We write today to comment on the Administration's proposed revisions to critical habitat economic impact analyses under the Endangered Species Act (ESA). The proposed changes have the potential to dramatically impact both jobs and private property rights across the nation. Thorough economic impact analyses are an essential component of any critical habitat designation under the ESA and must be done in a manner that reflects the true costs of such a designation. While we appreciate the Administration's efforts to implement a "more efficient rule-making process," we are concerned that the proposed changes are an attempt to avoid public scrutiny of the true consequences of agency action and may provide for an incomplete representation of the economic impacts on private and state lands.

The proposed regulation adopts a baseline approach when considering the economic impacts of a critical habitat designation (i.e., the agencies would presumably include in the baseline the effects that follow from listing). Such an approach allows regulators to consider only the "incremental impacts" of a critical habitat designation above the impacts that resulted from the actual listing. This baseline approach results in a less than thorough economic analysis and can be limited to the administrative costs of designating critical habitat. By using an incremental approach, the economic hardships faced by private property owners and state governments whose lands are designated as critical habitat are greatly discounted. This limited analysis is neither fair nor a true accounting of the costs that come with a critical habitat designation and

can lead to designation of lands as critical habitat in areas where the true costs greatly exceed the actual or perhaps only theoretical benefits.

Rather than focusing on the “baseline” approach, we recommend the final rule use a coextensive approach for its economic impact analysis. Such an approach accounts for the full cost of a critical habitat designation, including those costs that are associated with the listing. The coextensive approach is a more realistic accounting of costs associated with a critical habitat designation and helps both regulators and the public understand the actual costs of designating lands as critical habitat. Because it is a more thorough analysis, it is also a more transparent approach that will force regulators to be accountable to the public when they seek to make critical habitat designations that would limit economic activity on large swaths of private property and state lands.

We recognize that the critical habitat designation is technically a different phase of the ESA than the initial listing. However, to consider the impacts of a critical habitat designation as entirely different from the actual listing is not within the intent of the ESA where the statute contemplated both actions (listing and designation of critical habitat) as occurring at the same time.

In addition to our concerns about the proposed rule’s preference for a baseline analysis, we are concerned that the proposed rule focuses on the need for an economic impact analysis as primarily a tool to inform regulators. While an economic impact analysis should be used to inform regulators about the costs of designating an area as critical habitat, it should also be considered as an important tool to inform individuals, state governments, and the public at-large who are directly impacted by such a designation. A final rule should emphasize the importance of giving the public a full accounting of the true costs of a critical habitat designation, particularly in light of the hundreds of species being reviewed by your agencies pursuant to settlement agreements in which neither private property owners nor states were given the opportunity for input.

Finally, we note that the proposed rule gives the Secretary great discretion in choosing not to exclude areas from a critical habitat designation. The proposed rule notes that “the Secretary may choose not to exclude an area even if the impact analysis and subsequent balancing indicates that the benefits of exclusion exceed the benefits of inclusion and such exclusion would not result in the extinction of the species.” Because of the tremendous economic costs a critical habitat designation may have, we hope that the final rule will clarify a strong preference for excluding private and state lands from such a designation when the costs of such a designation outweigh the benefits.

In conclusion, we emphasize our concern that the proposed rule's use of the baseline approach ignores the true costs of a critical habitat designation. Such an approach is in direct contrast to the intent of Congress when the requirement for an economic analysis was inserted into the ESA in 1978. It also runs contrary to the goal of a transparent government. We urge you to reject that approach in favor of a coextensive analysis when the regulators assess whether to designate lands as critical habitat.

Thank you for your prompt attention to our concerns. Please feel free to contact us should you have any questions.

Sincerely,

D. D. Holt

Jefferson

John Cornyn

Sam McChesney

Michael B. Eni

Ray Hunt

Ron Johnson

Jim Kinch

Jerry Moran

Robert White

William J. K.

Quinn I. Hatch

Mr R

John Barrasso

Tom Lohm

Seb Fischer

Mike Crago

Tom Richardson

Pat Roberts

John Heller

7-28

John Bozeman

John Thomas